DOCUMENT RESUME

ED 272 874 CS 209 911

AUTHOR Smalley, David C.
TITLE First Amendment Rights of the Press in a Conservative Supreme Court.
PUB DATE Aug 86
NOTE 32p.; Paper presented at the Annual Meeting of the Association for Education in Journalism and Mass Communication (69th, Norman, OK, August 3-6, 1986).
PUB TYPE Reports - Evaluative/Feasibility (142) -- Speeches/Conference Papers (150)

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS Censorship; *Conservatism; *Constitutional Law; Court Litigation; *Freedom of Speech; *Government (Administrative Body); Government Role; *News Media; Political Attitudes
IDENTIFIERS *First Amendment; Prior Restraint (Censorship); Reagan (Ronald); *Supreme Court

ABSTRACT

Noting that seldom in American history has a president had the potential opportunity to appoint a majority to the Supreme Court as does Ronald Reagan and that scholars and columnists claim that First Amendment freedoms of the press have been eroding with little public notice over the past few years, this paper explores the prognosis for press freedoms under an imminently conservative court. Following an introduction, the paper examines the Court's current composition--observing that those justices most likely to depart from the Court are those most favorable to the First Amendment--and looks at the status of press freedom under this Court. Next, the paper speculates on how a Reagan-appointed Court would rule on First Amendment cases involving the press, observing that past appointees have both disappointed and shocked their benefactor and that the Senate has been nonpartisan in its approval of Court candidates, suggesting that this presents the press with at least intangible hope should Reagan appointments control the Court. Then the paper discusses the relationship between the Reagan administration and the press, noting areas of hostility from the former toward the latter. Finally, the paper looks at the judges Reagan would most likely appoint to a Supreme Court vacancy, and their respective ideologies, observing that the voting records of the top three candidates contribute to a sense that Reagan nominees will probably not be overzealous in their support of the First Amendment and the press. The paper concludes with a summary of the arguments suggesting that the press may be "on the verge of some very hard times." (HTH)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED272874

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

This document has been reproduced as received from the person or organization originating it.

Minor changes have been made to improve reproduction quality.

Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

FIRST AMENDMENT RIGHTS OF THE PRESS IN A CONSERVATIVE SUPREME COURT

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY

David C. Smalley

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

David C. Smalley
May 2, 1985

Winner, 2nd Prize
AEJMC Moeller Competition

CS209911

"We are under a Constitution, but the Constitution is what the judges say it is."

-- Supreme Court Justice
Charles Evans Hughes

INTRODUCTION

This paper will be a speculative study of the future of First Amendment press protection in the event of a Supreme Court dominated by Reagan appointees.

One might well ask the important question, "How can anyone know?" The answer to such a question proves to be detailed and exhaustive, yet ultimately satisfying. Four different tracks of analysis will be pursued here.

Initially, of course, there is the historical approach. There are almost myriad factors not only in the distant history of our nation but also in recent judicial and presidential events and decisions which can contribute to a scholarly analysis of past patterns and informed speculation about possible future repetition.

Also there are the words and actions of the major player involved: Ronald Reagan. One can look at his generally poor relationship with the press (as illustrated in one case by the Grenada incident), at his words to date concerning Supreme Court appointments, and even at the effectiveness and direction of First Amendment opinion written by his sole appointee, Mrs. Justice O'Conner, to begin to formulate a picture of the Court's First Amendment rulings down the road.

The Senate also merits analysis both historically and through to the present day, as each Justice must bear its stamp of approval. The Senate can, if it so desires, become a crucial third player alongside the President and the Justices themselves.

Finally, and perhaps most importantly, one can

examine the records and philosophies of the leading candidates for Court positions, and hence suggest their judicial sympathy or hostility toward the present day standing of media law.

So, this study will certainly not be wholly speculative. It will be in large part an analytical dissection of the past and present, and then a reformulation of this data with an eye to the future.

Why is this research important? Why bother to analyze the future direction of the Court? And why in this area of the law, freedom of the press, instead of more inflammatory First Amendment topics such as abortion or separation of church and state, or even the many recent legal changes in Fourth Amendment justice?

There are several vital reasons for the study. The first of these is that it is seldom in American history that a President has the potential to appoint a majority to the Supreme Court. Ronald Reagan's political philosophies and judicial direction could influence the Court, and hence America and her entire system of justice, for at least the next 50 to 100 years. For he has made it clear that he intends to exercise his right to place political prerequisites on his appointees. Thus the immediate prospect of an overwhelmingly conservative Court demands review, along with a forewarning of its long-term ramifications.

Second is the importance of the press in today's global society. Inflammatory topics such as abortion and

random car checks have already been, and will continue to be, well-covered and well-known. Many First Amendment scholars contend, however, that freedom of the press and freedom of speech have begun to erode over the recent past, to scant public attention. Such scholars include the noted Sidney Zion, columnists Jack Anderson and Walter Burns, and indeed even Justice Brennan on the Court. To witness this denegration of First Amendment protections is alarming to these scholars. Many have begun to ask: How would a thoroughly conservative Court, in large part appointed by what many claim to be an anti-media President, likely treat media law? Would the combination of the "negative" trend and a conservative Court be devastating to the hard-won advances of the Warren Court years?

Thus I will contend that what we face is the eve of history in the judicial direction of perhaps the next 100 or more years. It is the intention here to provide a window to the future of one aspect of that judicial direction.

THE COURT TODAY AND PROSPECTS FOR TOMORROW

As noted in the introduction, any analysis of future Court rulings must be based not only on historical events and their ramifications and patterns, but also in part on situations of the present day. Hence the initial task at hand is to examine the present Court and ask a very basic and simple question: What are the chances of imminent change in the membership of the Court? For indeed this entire study rests on the assumption that changes lie ahead for the Court's lineup and direction. Why, or perhaps more appropriately how, can this assumption be made?

To begin with, measure must be taken of the Court's current composition. The present membership is as follows: Harry Blackmun, William Brennan, Warren Burger, Thurgood Marshall, Sandra Day O'Connor, Lewis Powell, William Rhenquist, John Stevens, and Byron White. The Justices can be grouped in terms of their ages, their degrees of judicial activism or restraint, their case voting, or indeed their political partisanship tendencies. All of these groupings are pertinent here, for in order to paint an accurate picture it is not enough merely to assume that one or more Justices will be replaced during Reagan's second term; of the utmost importance is which of the nine it will be. In other words, should the conservative Warren Burger retire, a Reagan appointee would likely have a negligible effect in terms of the overall judicial direction of the Court. However, should one of the liberals or even

one of the centrists have to be replaced, the effect of another conservative Reagan appointee could be powerful indeed. This is especially true for the consideration here, that of the press in First Amendment rulings.

However the Justices are grouped, it would appear that those most likely to depart from the Court are those elder Justices held in highest esteem by First Amendment champions and especially by the press, who regard them as their judicial allies. For example, of the five Justices over 75, three are stalwart allies of the press - indeed, the only three such allies the press can count on in the Court today. They are Harry Blackmun, William Brennan, and Thurgood Marshall.

Blackmun is nearing 77 years of age, yet nonetheless said in early 1983 that he was in excellent health. "Some of the younger ones (Justices) are probably in less good physical shape than some of us old bats," he said.[1] However, in September of 1984, Blackmun stated that he was "never so tired," and that being a Justice "is a rotten way to make a living."[2]

Although appointed by Nixon (a notorious anti-press President) and once known as the "Minnesota Twin" of conservative Chief Justice Burger, Justice Blackmun has nonetheless moved increasingly to the left. He sees it as his responsibility to correct the conservative tilt which Sandra Day O'Conner has added to the Court.[3] He has come

to be known as a staunch defender of the First Amendment and of the press. For example, he dissented in GANNETT v. DePASQUALE, which ruled that reporters may be banned from pre-trial hearings. He dissented in BRANZBERG v. HAYES, which ruled that there is no constitutionally protected privilege between reporter and source. And he was in the majority in RICHMOND NEWSPAPERS, Inc. v. VA., which ruled that the press may cover any criminal trial, unless a judge meets strict guidelines detailing no alternative to closure. Blackmun has been called "a man of conscience and good instincts who agonizes over each case." [4] He has received many death threats from religious fanatics (especially since the ROE v. WADE abortion decision of 1972, of which he was the author), including a bullet fired through his living room window in February, 1985. The pressure of the job, plus the constant harrassment, could push him ever closer to retirement.

Perhaps the press' best friend on the Court is William Brennan, the oldest and most liberal Justice. His health, however, is a major cause of concern for his devotees. In 1978 he was treated for a cancerous tumor in his throat, and in 1979 he suffered a stroke. Brennan has sided with the press in almost every case, and has today become the leading dissenter in a Burger Court, which is slowly but surely chipping away at the liberal foundation of which he was once a cornerstone. Yet rather than depressing him, he has been said to be in a generally optimistic mood of late, and has

recently remarried. His age and health, however, loom over him like a dark shadow, making the best friend of the press the most likely to leave soon.

Brennan's closest ideological ally and the last line of usually sure media defense on the Court is Thurgood Marshall, who will be 77 in July. The liberal Marshall has indicated that he intends to last out President Reagan and beyond, should he live that long. He has told both Jet magazine and ABC News, "I intend to serve out the full term to which I was appointed... and that means life."[5] However, he is burdened with serious health problems, including a heart condition. The day the Court legalized the death penalty, he suffered a mild heart attack. Marshall is perhaps the best example on the Court of the phrase, "The mind is willing, but the flesh is weak."

Thus these men most likely to depart are the same men who are the firmest defenders of the First Amendment and also the same three liberal men who Ronald Reagan would very much like to replace, and not just because of their First Amendment opinions. The odds seem heavily in the President's favor that at least one, and perhaps all three, will no longer be sitting on the bench three years down the road. Conservative Burger and the right-leaning moderate Powell, and other Justices over 75, have announced "no immediate plans of resignation,"[6] and Burger in any case is in far better health than the ailing Brennan and Marshall. Powell underwent minor prostate surgery in December, but has recuperated nicely.

Basically the situation becomes one of numbers. According to Justice Blackmun, the Court's politico-judicial lineup before O'Connor was 2-5-2; that is, two liberals (Brennan and Marshall), two conservatives (Burger and Rhenquist), and the remaining five Justices moderate centrists whose votes varied greatly from case to case. With the addition of O'Connor, however, he puts the present Court at a 2-4-3 situation. This means that the "conservative bloc" needs only two centrist votes to win each decision. When could the conservative Justices command a firm majority? A table is useful here in illustrating the situation.

IF: 1 liberal leaves, Court stands at 1 - 4 - 4
(liberal-centrist-conservative)
- Only one centrist vote needed for conservative majority per case

IF: 1 centrist leaves, Court stands at 2 - 3 - 4
- Only one centrist vote needed for conservative majority per case

IF: 1 liberal and 1 centrist leave, Court stands at 1 - 3 - 5
- Conservative majority

Of course, none of this is to say that the conservative Justices, nor the liberal or centrist Justices for that matter, will always vote together. For instance, Blackmun was one of

only three dissenting votes in the Pentagon Papers case, joined by the conservative Chief Justice and Justice Harlan, another centrist. And in the Watergate Tapes case, Rhenquist and Burger actually voted against Richard Nixon, the man who had appointed them. Yet by and large the voting records speak for themselves; Brennan and Marshall vote together in most of the cases, as do Burger, Rhenquist and O'Connor. Splits in these two groups are rare. As for the moderates, Justices White and Powell often give the conservatives the all-important fourth and fifth votes; there was an increased number of 5-4 decisions in the previous term when of all Justices White wrote the fewest dissents, Blackmun and Stevens the most, and conservatives won important gains. (In the present term Powell's absence necessitated many 4-4 deadlocks but had he voted the result would likely have paralleled the previous terms.) All this combined with the fact that White has been called "moderately anti-press"[7] in his opinions provide a grim picture for the media before the present Court, where such decisions as HERBERT v. LANDO have begun to whittle away at the TIMES v. SULLIVAN libel beachhead (LANDO ruled that a public figure charging libel could question a reporter about his or her "state of mind") and where ZURCHER v. STANFORD DAILY ruled in favor of search warrants, easily obtained by police from sympathetic magistrates, for searching newsrooms. As recently as December 1984 in SEATTLE TIMES v. RHINEHART the Court upheld a lower court ruling barring publication of pretrial discovery materials, thus severely hindering media scrutiny of civil court proceedings. As Blackmun put it, the Court is "moving to the right," doing

what it wants "by hook or by crook."[8] Justice Stewart, before his departure, said that the Burger Court has taken a "crabbed view" of the First Amendment and has exhibited a "disturbing insensitivity" to the role of the press.[9] And now Stewart himself is gone.

So the Court appears. For the press, it is an age of pessimism and worry about an even darker tomorrow. Should they lose even one ally on the Court, the situation would become far worse. Unfortunately for the press, there are three Justices who hold poor odds of remaining on the bench for long, and those three Justices are the same men who share their views of the First Amendment. With increasingly important problems coming up for them, such as the legality of press pools selected by the President, lie detector tests by the Administration to discover "leaks" and increasing outcry on both sides of the question of public figure libel suits, the press has good cause for concern.

JUDICIAL POLITICS AND THE PRESS IN THE FACE OF HISTORY

How would a Reagan Court rule on First Amendment cases involving the press? The first step to answer this question is to determine whether Reagan Justices would back up his opinions on any or every legal question. We may reasonably assume that Reagan would like all his judicial appointees (and he has at present 115 spots to fill) to share his political, social and judicial philosophies, as would any President. In Reagan's case, this would mean searching for judges who

"interpret, not make"[10] the law, and who would perhaps rule differently on many of the social decisions of the Warren Court by getting "tough" on criminals, ending busing, etc. An ideal Reagan Justice would also disapprove of ROE v. WADE, would want to delegate certain authority to the states, and would respect a strong Executive Branch in its efforts to provide national security through various means, including media access restrictions.

Yet wanting a judicial disciple and selecting one are two different things. A historically unique and highly interesting pattern of Presidents and their Supreme Court appointments reveals repeated surprises and disappointments. Appointees in fact often dismay and shock their "benefactors" upon reaching the Court; the expected tilt to right or left often either fails to materialize, or indeed tilts the other way. Justice Frankturter said that if a Justice "is any good" then he or she must change upon reaching the Court.[11] Earl Warren said he did not "see how a man could be on the Court and not change his views substantially over a period of years... for change you must if you are to do your duty on the Supreme Court."[12] The Court's lifetime terms and far-reaching decisions seem to give some Justices a chance to read a bit differently and a bit more into the Constitution than they had prior to appointment.

This pattern reaches back to the very beginning of Court history, and seems limited neither by the times or politics of

the Justices involved. The progressive minded James Madison, for instance, found his appointee, Joseph Story, to be an "inveterate Tory." Theodore Roosevelt found his Court-packing attempt devastated by his appointment of Oliver Wendell Holmes, Jr., who frequently wrote anti-administration opinions. Roosevelt issued a famous dictum on Holmes, which reflected much about presidential frustrations with nominees, when he said, "I could carve out of a banana a judge with more backbone than that!" James McReynolds, a Wilson selection for the Court, turned out to oppose nearly every position of the liberal administration that appointed him. And conservative Dwight D. Eisenhower lamented the choice of surprise-liberal Earl Warren as "the worst damn fool mistake I ever made."[13]

The three most famous cases of presidential disappointments with the Court can actually be found in the recent past. Franklin Delano Roosevelt, for instance, came to office facing a highly conservative Court (much as Richard Nixon came to office facing one of the most liberal Courts in U.S. history). Roosevelt's New Deal programs began to fall, one by one, to the judicial axe wielded by a conservative and elder bloc of four Justices, dubbed "the Four Horsemen."[14] Ruled void by the 1936 term were the administration's Hot Oil Act, railroad pensions, farm mort-ages, the National Recovery Act, the A.A.A., Municipal Bankruptcy Act, and the Guffey Act.[15] Furthermore, prospects remained grim for other aspects of the New Deal, including a minimum wage, the National Labor Relations Act, and the Social Security Act, which the Administration dearly wanted. Roosevelt determined to do

something about the "old men", for in striking down so much New Deal legislation, the Court was, at least to Roosevelt, invalidating the entire New Deal and hence the economic recovery of the nation.

His plan was to neutralize the older conservative votes. Roosevelt know that a constitutional amendment for an age limit on the Court would likely fail, and would take too long to come about in any event. He discovered, however, a loophole in the Constitution -- that there is no directive for a fixed number of Justices on the Court. He thus proposed to Congress the addition of one new Justice for each Justice over 70, saying, "A constant and systematic addition of younger blood will vitalize the courts and better equip them to recognize and apply the essential concepts of justice in the light of the needs and the facts of an ever-changing world."[16]

There was a tremendous uproar throughout the country, and despite determined administration efforts, the measure died in the Senate. The Court went on ironically to uphold important aspects of the New Deal, and Roosevelt eventually was able to fill five vacancies of retired or deceased Justices. The popular view of this outcome was that Roosevelt's bold plan stung the Justices into fearful support of the Administration's legislation. As the famous saying of the time went, "A stitch in time saved nine."[17]

Yet the plan, after all, died. It was unpopular throughout the country, especially so with the press, and did not even come close to passing in the Senate despite hardline Adminsitration pressure on nearly every Senator.

Are we to believe that the Justices, supposedly the best legal minds in the country, quaked with fear at an obviously exploitative, manipulative and ultimately unsuccessful executive "coup" attempt? Are we to believe this especially when these particular legal minds were four tough, honest and feisty old men? I think not. (The fact is that FDR had barely lost on many of the earlier votes, and even after some of the Justices died or resigned, the Court still barely approved of later New Deal legislation.) The moral of the Court packing plan and its results, as I see it, seems rather to be that the Court is an institution above politics and juggling attempts. That moral can be looked upon at least as perhaps a small source of hope for the press of today.

Other later historical facts support this picture of Supreme Court sanctity. Lame duck President Lyndon Johnson attempted to juggle the Chief Justiceship in 1968 when, in political collaboration with Chief Justice Earl Warren, he announced Warren's desire to retire and announced that Justice Abe Fortas, an old LBJ acquaintance, was to take over as Chief Justice. It was a move typical of Johnson's years of "wheeling and dealing" in the Senate to attempt political manipulation of a Court that supposedly transcends politics. Many charged Johnson with a form of nepotism. The Senate thus blocked the plot on both ethical and legal grounds. (Fortas came under intense financial scrutiny and legal investigation at the time.) Warren, in turn, refused to resign, saying, "Since they wouldn't confirm Abe they will have me."[18] Another President's juggling attempt had failed.

Finally, the Senate "defended" the Court yet again during the Nixon Administration, when it rejected two Nixon nominees for the Court, Judges Haynesworth and Carswell, both from the South. Nixon had selected the men solely on the basis of their political demographics (age, conservatism, and especially birthplace) rather than on the basis of legal capability. Once again blatant political manipulative meddling with the Court was proven ineffective. Nixon also fell prey to the "judicial surprise" syndrome just discussed, for he appointed Harry Blackmun with every expectation that the Justice would be a bedrock of judicial restraint and political conservatism, which has hardly been the case today.

Thus what the press has at this point is at best an intangible basis for hope should Reagan appointments control the Court. The pattern of judicial surprise has been repeated even up to Justices on the bench today (Blackmun and Stevens, for instance). The surprises certainly are exceptions, but the numbers and frequencies of their occurances are enough to make them a solid factor of the Court's reality.

While Sandra Day O'Connor, for instance (Reagan's sole appointee to date) has certainly performed as expected in most votes, there is no way of foreseeing how she might change over the years, not indeed how future Reagan appointments might turn out. In fact, while O'Connor has voted in only a few cases involving freedom of the press, and the Freedom of Information Act (5 cases from her appointment to mid-1984),

she has proved surprisingly agreeable from a media standpoint. While she joined a unanimous Court in granting increased powers to FOIA Exemption Five (FTC v. GROLIER, Inc.) she sided with Blackmun, Brennan and Marshall in dissent over FBI v. ABRAMSON, which gave increased clout to Exemption Seven. She concurred in GLOBE NEWSPAPER CO. v. SUPERIOR COURT which struck down court closing during a minor's rape trial. She actually wrote the opinion in MINNEAPOLIS STAR & TRIBUNE CO. v. MINNESOTA COMM'R OF REVENUE, which struck down as violating the First Amendment a special taxation on paper and ink. In the latter three of these cases, she voted differently than Rhenquist, which is statistically rare.

Thus a President makes only an educated guess when he selects a judge for the highest court in the land. As Harry Truman put it, "Packing the Supreme Court simply can't be done ... I've tried and it won't work ... Whenever you put a man on the Supreme Court he ceases to be your friend. I'm sure of that."[19] This historical pattern, then, and O'Connor herself offer the press at least a modicum of hope.

Some hope, too, rests in the Senate, where all Supreme Court nominees must be approved. As noted above, the Senate has proven thus far to be nonpartisan and fair in its crucial role as the third player in the nomination process. While the Senate regularly acts simply as a rubber stamp for various administration selections for other office holders, it has perhaps proven that nothing too outrageous will pass through its chambers. However, if ideologues and extremists of varying stripes come into the Senate, there is a likelihood

that at least some Senators, if not a majority, would ignore the candidate's qualifications and instead concentrate on the nominee's position on a single issue. This would indeed be a sad decline from the vigorous and forceful role the Senate has sometimes played to date.

A single issue at present which could be the focus of approval or rejection is, of course, the issue of abortion. President Reagan and the Republican Party have made it clear that all judicial candidates must "respect the sanctity of innocent human life." ? Very recently, three ultraconservative members of the Senate Judiciary Committee (Sens. Hatch, Denton and East) composed a test for judicial candidates in the form of 22 questions. Seven of these questions deal with abortion.[20] Thus, as noted above, candidates' integrities, intelligence and legal backgrounds may be subjugated to a backseat in favor of an eight-page political questionnaire. In fact, Reagan recently withdrew two nominees from consideration due to heavy anti-abortion pressures both in and outside of the Senate.

How this testing and pressure will affect the press is difficult to say. On the one hand, the press can perhaps take solace from the fact that the litmus test is an anti-abortion one, and not anti-First Amendment or even directly anti-media. Perhaps an anti-abortion Justice would be an ally of the press. Yet anti-abortion forces frequently are conservative, a political position associated with views of strict limitations on First Amendment freedoms.

Thus it seems in the end that all hopes for the press -- historical patterns of judicial surprise, Senate independence,

and litmus tests which in effect ignore the press -- could prove to be dulling and self-annihilating mirages. The bottom line is that the press will face a deck heavily stacked against them in a Reagan Court. The best they will be able to do is hope for a joker in that deck.

REAGAN AND THE PRESS

While the major Reagan litmus test for Justices may not be hostility to a robust press, there can be no denying the difficulties and disputes between the First and Fourth Estates over the past five years. Many reporters have charged President Reagan with reversing a trend of openness to the press to an extent not seen since World War Two. An examination of these poor relations is important not only because it sheds light on the question of Reagan's appointeees bearing shared negative outlooks on the press, but also because some of Reagans press restrictions likely will end up being challenged as unconsitutional in a Court dominated by his appointees. Rulings arising from such challenges could affect presidential-press relations for many years to come.

Judging from his words and actions, the President seems to look on the press with disfavor, if not as downright enemies. Helen Thomas, a UPI correspondent for many years, says, "Access to Reagan is very limited and under the most controlled circumstances ... He thinks we (the press) should be seen and not heard."[21]

Reagan's chief concern seems to be "national security."

For instance, he likened the publication of the Pentagon Papers to "receiving stolen property and selling it for profit."[22] Many journalists, however, have accused Reagan's "security" actions of being simply anti-press actions. For in the name of national security Reagan has taken many drastic steps aimed at curtailing "improper" actions of the media. They include: virtually declaring war on the Freedom of Information Act (FOIA); ordering all Executive branch employees not to speak to reporters without first having obtained White House approval; ordering such employees to submit to lie detector tests to discover sources of leaks; attempting to keep silent members of past administrations and former intelligence sources; putting tracers on government phones; enacting Justice Department regulations allowing infiltration and internal investigation of the media; creating a White House "news service" to distribute presidential speeches and announcements, thus by-passing the independent media; creating a furor over revelations of military use of the space shuttle when the knowledge was publicly available; and of course the culmination of all of these: barring the press from the battlefront for the first time in American military history in Grenada.

The FOIA in particular has had numerous direct shots taken at it by the Reagan Administration. Only a sampling are included here. In May 1981, the Attorney General's office greatly tightened the guidelines on releases of information from government files by abandoning the earlier and easier standards of the Carter Administration. It also attempted to extend the scope of the nine exemptions. The Administration's desire

was to "make obtaining information more difficult." Then in October of the same year, a proposal was made to the Senate for constrictive FOIA "improvements," calling the present Act a "highly overrated instrument." The proposal did not pass. In January of 1983 the Administration made much stricter the requirements for fee waivers to people using the FOIA. This put an added burden on those attempting to use the Act. The Administration in 1984 succeeded in excluding all CIA operational files from the FOIA.

Many of these major moves against the press are taking their toll. For instance the "prior clearance for interviews" rule has proved devastatingly effective. Experienced reporters at both the White House and other Executive departments (the Office of Management and Budget and National Security Council to name two) have noted a substantial cut-off of sources.[24] Reagan's exact words concerning the motives behind this order had nothing to do with national security. Rather, as he put it, "I've had it up to my keister with these leaks."[25]

Perhaps Reagan's poor press relations can be best summed up by the incidents surrounding the Grenada invasion. During that action the press was not only not told of it, but was actually told by the White House spokesman that the idea of an invasion was "preposterous." Once the invasion was announced, the Administration engaged in a "campaign of secrecy and news orchestration."[26] No journalists were allowed near or on the island at all, under threat of being shot. Several who made their own way to the island were lured onto a Navy warship and held for days. The rationale behind these

decisions was the government's inability to guarantee reporters' safety. Yet this explanation seems weak when one considers that the press had covered far more dangerous conflicts than this, including Korea, Cambodia, Vietnam and Lebanon.

What made Grenada even more of a black mark in free press history -- besides this complete blockage of information -- was the selective and often false information released by the White House, information meant to paint a favorable picture of the invasion. In other words, the only facts at first known about the invasion were facts the Administration wanted known, and even these were sometimes deliberate deceptions. Cuban troop strength, arms and positions on the island were vastly overrated, the bombing of a mental hospital not announced, casualty reports fluctuated, and it was not announced that the Navy threatened to fire upon unauthorized press boats trying to reach the island. Later the Administration announced the formulation of a small pre-selected pool of reporters for future military missions.

In the final analysis, the facts speak louder perhaps than any editorial could. This Administration and the press are bound to be forever at odds, for one seeks to control, the other to reveal. Whether the President's actions are legal, just and rational will likely have to be settled in Court.

A Court appointed, perhaps in large part, by him.

FUTURE JUSTICE

The time now arrives to fit the final piece into

this vast and intricate puzzle of the Supreme Court and the First Amendment rights of the press. Who will be the next Justice(s) should Ronald Reagan have the highly probable opportunity to make one or more appointments? Or, at any rate, who are the possibilities most frequently mentioned by media and White House personnel? What do the prospects' personal and judicial records tell us about their philosophical bents? How have they voted on First mendment press cases thus far?

The three most commonly cited Reagan possibilities are Robert H. Bork, Antonin Scalia, and Richard A. Posner. All three white males are conservative justices on U.S. Courts of Appeals. Both Bork and Scalia sit on the D.C. Circuit, a testing ground for constitutional challenges to federal law. Posner is on the Seventh Circuit covering Illinois, Indiana and Wisconsin. All three men would pass the anti-abortion litmus test that has already been mentioned here, and all three are strong believers in judicial restraint and separation of powers.

Bork, 58, is by far the most commonly mentioned name both by White House officials and by the media. He is famous for carrying out Richard Nixon's Saturday Night Massacre, the firing of Watergate Special Prosecutor Archibald Cox, in 1973. Bork was Reagan's first appointment to the D.C. Circuit in February 1982. He has not, unfortunately for this study, voted on any cases directly involving the press, nor has he produced any articles dealing with speech or press since his appointment. However, he voted on three cases involving the Federal Communications Commission in 1984, and in each

instance he sided with the government agency and against broadcasters. In CITY OF N.Y. MUNICIPAL BROADCASTING SYSTEM v. FCC , voting in favor of FCC crackdowns on a New York City radio station, he wrote, "though we recognize ... the significant loss to N.Y. City that is the inevitable consequence of the Commission's decision, we cannot overturn that agency's reasoned decision."[27]

Bork is a "highly respected conservative Constitutional scholar"[28] who would seem to be very much sought after by the Reagan team. While he has not, to this date, dealt with the press, he has spoken out against homosexual and other individual rights recognized by the nation's courts. Overall, he does not present an overly palatable prospect for the media; certainly he has made no effort to get involved in any media cases before the D.C. Circuit.

The next man in line, also a Reagan appointee to the D.C. Court of Appeals, is Antonin Scalia, age 48. He is a great believer in judicial restraint. At the conception of this study, he had not voted on many cases even remotely related to the press since his appointment in August of 1982. However, in the current month of April, 1985, Scalia took part in a libel case that chilled the hearts of newspaper editors throughout the country. He voted, in a 2-1 ruling, to reinstate a jury's verdict declaring the Washington POST guilty of libel against a former president of Mobil Oil Corp. The verdict and two and a quarter million dollars in awarded damages had earlier been overturned by a lower court judge. Scalia and a semi-retired Judge McKinnon (his ally on this case) found the earlier

dismissal to be "inappropriate" and ruled that the POST published falsehoods "with reckless disregard" because one copy editor had voiced questions over the story. Judge J. Skelly Wright bitterly and sharply dissented in the ruling. He accused Scalia of trying to achieve "no less than an ambitious, wide-ranging revision of libel jurisprudence. If this excessive verdict on these mundane, flimsy facts is upheld, the effect on freedom of expression will be incalculable. The message to the media will be unmistakable -- steer clear of unpleasant news stories and comments about interests like Mobil or pay the price ... Indeed, the majority appears to criticize what it takes to be the general climate of journalism today."[29]

The Washington POST has asked all ten active D.C. appellate judges, as well as semi-retired MacKinnon, to rehear the entire case. If at least six of these judges agree, then the case will indeed be reheard. The scanario could be an interesting if somewhat frightening one for the media. Bork would vote in a highly visible press case for the first time. Scalia would obviously go against the POST again, but might even add further clues as to his general philosophy regarding the press. It is reasonable to assume that Bork would vote against the POST; he and Scalia bear close ideological ties on nearly everything else, and both know that the conservative and anti-press Reagan is watching their every vote with care. The media might well find out to what extent one or both of the two possible Supreme Court Justices is an enemy or friend of a vigorous and robust press.

The final leading candidate for appointment is Richard Posner with the Seventh Appeals Circuit, age 45. Posner was appointed by Reagan in late 1981 and has produced more than 220 opinions in the three years since. Like Bork and Scalia, he has not been directly involved in many cases relating to the press. In GEORGES v. CARNEY he wrote, "the First Amendment forbids government to interfere with competition of ideas but does not require it to create well-informed citizenry, or to subsidize newspapers, book publishing, sound-tracks, or soap boxes." This seems to be a good example of many of his First Amendment opinions; he is a conservative, true, but acts with an eye to both sides of a question. He is not, perhaps, an extremist, despite adamant objections to the exclusionary rule of illegally seized evidence in court. With regard to the media, his opinions are next to none and we are presented with no clear picture either way.

One must remember that these men are simply the most commonly mentioned possibilities out of thousands of potential judges and even non-judges across the country. It is entirely possible that President Reagan could nominate a person never publicly mentioned by the White House, or speculated upon by the legal profession or the press, for any future vacancies on the Supreme Court. After all, Sandra Day O'Connor was never speculated about before her appointment to the Court. And indeed, as has been seen here, O'Connor has proven thus far to be no particular enemy of a robust press. It is also entirely possible that Reagan could nominate an insider, such

as former California Judge William P. Clark, or Attorney General William French Smith.

Still, Bork, Scalia and Posner certainly are desirable candidates from the Reagan perspective, and this is bound to cause feelings of disquiet in various editors and First Amendment scholars throughout the country. Another reason for such feelings of disquiet might arise from Reagan's judicial appointments in California. Then-Governor Reagan's legal affairs secretary, Paul Haerle, said, "They (the selectees) didn't have to be Republicans, but we made sure they weren't liberals." Former Governor Jerry Brown;s legal affairs secretary said that Reagan, in his second term of office, "appeared far more concerned with candidates' philosophies than with their talents." Governor Reagan's most famous selection was appellate Judge Lynn D. (Buck) Compton, who in a highly controversial opinion implied that women who hitchhike deserve and are asking to be raped.

Again, past Reagan guvernatorial appointments and the voting records of the top three candidates (especially Scalia, in the recent POST case) contrigute to a sense that Reagan nominees likely will not be overzealous in their support of the First Amendment and the press.

CONCLUSION

I think that certainly a case arises from the various arguments and facts presented here for a highly justified apprehension on the part of the media. In their necessarily myopic peerings into the dark road of the future, members of the press and First Amendment scholars have logic on their side

in maintaining a pessimistic outlook. The press is realistic enough to know that "judicial surprise" and the "independent Senate" syndromes cannot be relied upon with any degree of confidence.

The facts show the press, and the media in general, facing:

-- the divided Court of today;

-- its likely prospects for conservative change tomorrow;

-- judicial politics in the past;

-- an increasingly overzealous Senate bound and shackled by litmus tests;

-- a proven anti-press President;

-- and of course the prospects for future justices with uncertain attitudes toward the First Amendment.

Faced with all of this, the facts say that the press may be on the verge of some very hard times.

FOOTNOTES

[1] NYT Mag., Feb. 20, 1983

[2] TIME, Oct. 8, 1984, p.31

[3] NYT Mag.

[4] Washingtonian, Dec. 1979, p. 131

[5] Washingtonian, Dec. 1982

[6] Ibid.

[7] Washingtonian, Dec. 1979, p. 131

[8] TIME, p. 28

[9] Blasi, Vincent, ed. The Burger Court. Yale University Press, New Haven, 1983, p. 63

[10] National Review, Sept. 7, 1984, p.20.

[11] Abraham, Henry J. Justices and Presidents. Oxford University Press, New York, 1974, p.63.

[12] Ibid

[13] Armstrong, Scott, and Woodward, Bob. The Brethren. Avon Books, New York, 1981, p. 5

[14] TIME, p.34

[15] Amherst College. Franklin D. Roosevelt and the Supreme Court. D.C. Heath and Co., Boston, 1952. p.vi

[16] Ibid. p. 19-20

[17] TIME, p.34

[18] Abraham, p.3

[19] Ibid, p.63

[20] Boston Globe. April 15, 1985.

[21] Thompson, Kenneth W., ed. The White House Press on the Presidency. University Press of America, New York. 1983. p.41

[22] TIME, p.34

[23] Thompson. p.36

[24] The News Media and the Law. p.22, 1984

[25] Ibid, Sept/Oct, 1983. p.34

[26] Washington Post, Oct. 27, 1983

[27] Washingtonian, Dec. 1979

[28] Boston Globe, April , 1985. pp. 1, 9.